Viscount Birkenhead L.C. in the case of *Sutters* v. *Briggs*[2]:—

"It is impossible for the drawer (of the cheque) to know whether the person, be he banker or not, who presents the cheque for payment, is a holder in his own right or a mere agent for collection".

In the present case the specific issue was whether the Bank of China was the holder for value of the appellants' cheques or whether they merely held them as collector for their customer Heng Moh & Co. My view is that that was a question that was incapable of being decided on the affidavit evidence which was before the Court, and in the circumstances I would say was beyond the category of cases to which the Order was intended to apply as described by Bramwell B. that is cases, which "almost on the admission of the defendant are undefended".

In the circumstances I would make an order setting aside the judgment which has been entered and giving the appellants leave to defend.

Order accordingly.

Solicitors: *Braddell & Ramani*; *Presgrave & Mathews.*

YONG YUEN POI v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson C.J.) December 2, 1960]

[K. L. — Selangor Criminal Appeal No. 64 of 1960]

Criminal Law and Procedure — Tactical onus — Passing to accused — Declaration for obtaining citizenship.

In this case the appellant made a declaration in 1957 for the purpose of obtaining citizenship, that he had been resident in Johore Bahru from 1950 to 1956 and in Kuala Lumpur from 1956 to 1957. He was found to be in possession of a Singapore identity card, issued in March 1950 which showed that then, and again in January 1954, the appellant had stated that his address was at two named places in Singapore, and in April 1957 that his address was in Kuala Lumpur. The learned Magistrate accepted as *prima facie* evidence that it was not true that from 1950 to 1957 the appellant had been resident in the Federation, and convicted the appellant.

Held: in the circumstance of the case the tactical onus passed to the appellant to explain away the entries on his identity card.

CRIMINAL APPEAL.

Robert Hoh for the appellant.

B. T. H. Lee (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): There is no doubt as to the universal truth of the proposition that in every criminal case the duty lies upon the prosecution in one way or another to prove the case against the accused person beyond reasonable doubt. In practice, however, the situation very commonly arises in a criminal prosecution that evidence is produced for the prosecution which unless it is contradicted or weakened or explained away in some manner by the defence will justify the conviction of the accused person. In that sense it can be said that what we call the tactical onus has passed to the accused. In other words, if he does not deny and if he does not explain away then the Court is entitled and in some cases is obliged to convict him.

That is just what happened in this case. The appellant made a declaration before the appropriate functionary for the purpose of obtaining citizenship that he had been resident in Johore Bahru from 1950 to 1956 and in Kuala Lumpur from 1956 to 1957, which was in the year in which he made his declaration. He was then somehow or rather found to be in possession of a Singapore registration card which had been issued in March 1950. That in itself might not have amounted to a very great deal but an examination of the card showed that in March 1950 the appellant had stated that his address was at 51, Lincoln Road, Singapore, that in January 1954 he had stated that his address was then at Boon Tiong Road and that on 24th April, 1957, he stated that his address was at 31, High Street, Kuala Lumpur. To my mind the Magistrate was right in accepting that as *prima facie* evidence that it was not true that from 1950 to 1957 the appellant had been resident in the Federation. After all the requirement is continuing residence. The position then was that the tactical onus passed to the appellant to explain away the entries on his identity card. It was not one entry that wanted explaining away; it was three entries that needed explaining away. He made no attempt to do so.

The appeal against conviction is dismissed.

Appeal dismissed.

Solicitors: *Eugene Lye & Hoh.*

MAANI v. MOHAMED

[A. C. J. (Ismail Khan J.) December 6, 1960]

[Seremban — Civil Appeal No. 6 of 1960]

Land Laws — Customary Law — Small Estates Distribution Ordinance, 1955, s.12 — Distribution of property according to customary rule — Personal law.

This was an appeal from an order of the Collector upon an application for the distribution of a small estate consisting of two pieces of land according to customary rule.

Held: the Collector should rehear this case and consider the personal law of the deceased and any local custom forming part thereof and for that purpose to require the attendance of all persons such as the lembagas who may be able to give evidence regarding any custom applicable to his estate of the deceased. *Re Haji Mansur bin Duseh*[1] and *Sali* v. *Achik*[2] considered and followed.

Cases referred to:—

(1) *Re Haji Mansur bin Duseh* [1940] M.L.J. 110.
(2) *Sali binti Haji Salleh* v. *Achik* [1941] M.L.J. 14.
(3) *Haji Hussin* v. *Maheran* [1946] M.L.J. 116.

CIVIL APPEAL.

Parties in person.

Ismail Khan J.: This is an appeal from the order of the Collector upon an application for the distribution of a small estate consisting of two

pieces of land, viz. one-fifth share in E1998 and E3007 Mukim of Terachi, District of Kuala Pilah, Negri Sembilan.

The facts are as follows. One Yassin bin Bakar died on 6th January, 1958 leaving a sister the appellant, a son by a second wife the first respondent, and a daughter by a third wife the second respondent. At the time of his death the deceased was the registered proprietor of the said two pieces of land which he had acquired before he married his second wife.

The appellant renounced all claim in respect of the land comprised in E1998, Mukim of Terachi. She however claimed the whole of the land comprised in E3007 as it was acquired by the deceased during his marriage to his first wife whom he had divorced. In effect, she claimed distribution of the estate according to the customary rule. An unsatisfactory feature of this case is the rather perfunctory manner in which it was dealt with by the "Trial Collector". Hearsay evidence was admitted and there is nothing in the record to indicate that the parties were given an opportunity for cross-examination. No attempt appeared to have been made to call witnesses who might be able to give evidence regarding the local customary rule, if any, governing the distribution of the estate. In proceedings under the Small Estates (Distribution) Ordinance, 1955, the provisions of section 12 thereof should always be kept in view. The Collector made an order for the distribution of the land to the first and second respondents under the unvaried rules of the Muslim Law. The reason for the exclusion of the local customary rule was because the Collector held that the land is "not customary land". The meagre grounds of judgment do not show how he arrived at such a conclusion, whether it was because of the absence of the indorsement "customary land" on the title or whether it was as a result of an enquiry under section 4 of the Customary Tenure Enactment, Cap. 215. It is not necessary for the purpose of this appeal to go into this question because in the case of non-customary lands the legal position is, in my view, correctly set out by Cussen J. in *Re Haji Mansur bin Duseh*[1], and followed by Horne J. in *Sali binti Haji Salleh* v. *Achik*[2]. The general effect of these two judgments is that the distribution of such lands is governed by the personal law of the deceased, and if it is proved in a particular case or if it is generally accepted in the district that the Muslim Law of descent is varied by local custom (adat), effect should be given to such custom (adat) as the personal law of the deceased. In the case of *Sali binti Haji Salleh* v. *Achik*, it was held that the fact that the title of the land is not indorsed "customary land" does not preclude the Collector from considering the personal law of the deceased which may be Muslim Law varied by local custom (adat).

In a later case *Haji Hussin* v. *Maheran*[3], it was held that notwithstanding a finding by the Collector under section 4 of the Customary Tenure Enactment, Cap. 215 that the land was not customary, it was still open to him to distribute the land in accordance with custom (adat).

The record in this case does not show if the Collector had considered the question of the personal law of the deceased and if local custom (adat) formed part of this personal law.

In the result I allow this appeal and the order of the Collector is set aside. The Collector is hereby directed to rehear Distribution Suit No. 200 of 1959 and to consider the personal law of the deceased and any local custom forming part thereof and for that purpose to require the attendance of all persons such as the *lembagas* who may be able to give evidence regarding any custom applicable to the estate of the deceased.

I make no order as to costs.

Appeal allowed.

P. GOVINDASAMY PILLAY & SONS LTD. v. LOK SENG CHAI & ORS.

[O.C.J. (Ismail Khan J.) March 30, 1961]

[Malacca — Civil Suit No. 7 of 1960]

Probate and Administration — Grant of letters of administration obtained but not extracted — Whether such person can be sued in representative capacity — Probate and Administration Ordinance (S.S. Cap. 51), ss.2 and 17.

In this case the issue was whether a person who has obtained an order from the Registrar for the grant of letters of administration to issue can be sued in a representative capacity before the grant is extracted by him for the purpose of enabling the liability of an intestate estate to be determined and paid out of the assets of the deceased. The plaintiffs' claim was against the first and second defendants as administratrix and administrator respectively of the estate of one Goh Tiong Tan, deceased, for damages for breach of contract and/or duty as common carrier and/or negligence in and about the carriage of goods. It was alleged that the plaintiffs entrusted certain goods to the deceased for conveyance by boat and the goods were lost during transit in blameworthy circumstances. The defence was *inter alia*, that the defendants have not been constituted the legal representatives of the deceased and cannot be sued in that capacity, and therefore the plaintiffs' action was incompetent and ought to be dismissed *in limine*.

Held: a person who has obtained a grant of letters of administration but who has not extracted such grant cannot be sued in a representative capacity. It is the grant under seal and not the order of the Court that grant should issue which confers status. *Chia Teck Liang* v. *Tan Soo Khiang* (1); *Meyappa Chetty* v. *Supramaniam Chetty* (3); *Ingall* v. *Moran* (4) followed. *Chia Foon Sian* v. *Lam Chew Fah* (2) disapproved. *Muthoo Karuppan Chitty* v. *Onan* (6) and *Ibrahim Sah* v. *Zahara Bee* (7) doubted.

Cases referred to:—

(1) *Chia Teck Liang* v. *Tan Soo Khiang* [1936] M.L.J. 185.

(2) *Chia Foon Sian* v. *Lam Chew Fah* [1955] M.L.J. 203.

(3) *Meyappa Chetty* v. *Supramaniam Chetty* [1916] 1 A.C. 603.

(4) *Ingall* v. *Moran* [1944] K.B. 160; [1944] 1 All E.R. 97.

(5) *Issar Singh* v. *Samund Singh* [1941] M.L.J. 28; [1941] M.L.J. Rep. 24.